

DE 01-023

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Complaint of Ann and Tim Guillemette

Order on Motion for Rehearing

O R D E R N O . 24,121

February 6, 2003

Petitioners Ann and Tim Guillemette seek rehearing pursuant to RSA 541:3 of Order No. 24,070, entered in this docket by the New Hampshire Public Utilities Commission (Commission) on October 24, 2002. The petitioners filed their motion on November 4, 2002. Respondent Public Service Company of New Hampshire (PSNH) submitted a pleading in opposition to the motion on November 6, 2002.

At issue in this case is the petitioners' contention that voltage fluctuations in the electric service provided by PSNH to their Bedford home entitle them to relief against PSNH. Order No. 24,070 resolved the case without making any findings adverse to the Company.

I. POSITIONS OF THE PARTIES

A. Ann and Tim Guillemette

In their rehearing motion, the petitioners contend that Order No. 24,070 erred by assigning the burden of proof to them. In support of this contention, the petitioners (1) challenge the statement in Order No. 24,070 that they had full recourse to discovery, (2) take exception to the determination in Order No.

24,070 that certain factual information - particularly the facts relating to the condition of petitioners' premises wiring - is solely within the control of the petitioners, given that the Commission determined that it was necessary to conduct an independent inspection of the wiring at the petitioners' premises and (3) contend that the Commission is holding petitioners responsible for the failure of an independent inspector hired by the Commission to submit a report with regard to conditions at the residence.

The rehearing motion further takes the position that Order No. 24,070 improperly failed to address the petitioners' argument that PSNH violated a Commission rule, Puc 1203.09, by "failing to provide the requisite full investigation and by failing to disclose either to [the petitioners] or the Commission all of the material facts of which it had knowledge." Rehearing Motion at 2. The petitioners draw the Commission's attention to evidence adduced at hearing concerning a teleconference between officials of PSNH and members of the Commission Staff at which PSNH discussed their reasons for denying the petitioners' claim for damages. It is the petitioners' contention that each reason provided by PSNH to Staff on that occasion has now been controverted by sworn testimony adduced at hearing. According to the petitioners, the Commission's failure to deliberate this issue and making findings on it is a violation of RSA 541-A:35

and deprived the petitioners of their right to due process of law.

Next the petitioners take exception to the determination in Order No. 24,070 that nothing in the record tends to establish that voltage variations experienced at the petitioners' residence caused harm to the petitioners or constituted inadequate service. The petitioners also challenge the Commission's decision not to express any view as to whether any of the voltage variations constituted "infrequent fluctuations not exceeding 5 minutes duration," which would exonerate PSNH from responsibility pursuant to Puc 304.02(h)(2). According to the petitioners, the record establishes "wild voltage swings from zero to 148 over a five minute period" and that voltage swings of that magnitude are inconsistent with public safety and the underlying purpose of the rule. It is the petitioners' position that these facts establish not only a violation of the rules but also of PSNH's delivery service tariff, given the Company's failure to provide voltage that is consistent with standard commercial practice.

The last argument in the rehearing motion returns to the issue of whether the record proves the existence of harm to the petitioners that was caused by PSNH. According to the petitioners, assuming *arguendo* that the burden of proving causation was properly assigned to them, the Commission has

unlawfully required the petitioners to exclude the possibility that harms they suffered are traceable to problems on the customer side of the meter. Finally, the petitioners contend, the only record evidence about the condition of the wiring in their home is a December 31, 1996 letter from an electrician hired by petitioners and read into the record at hearing by petitioner Ann Guillemette. According to petitioners, this letter clearly reflects the electrician's conclusion that any problems being experienced by petitioners was not on the customer side of the meter.

B. Public Service Company of New Hampshire

In its opposition to the motion, PSNH takes the position that it was neither unlawful nor unreasonable for the Commission to allocate the burden of proof to the petitioners given that they instituted this case by filing a formal complaint with the Commission. According to PSNH, the Commission has broad discretion under RSA 365:4 to determine the manner in which it will conduct an investigation.

PSNH further contends that the petitioners have no basis to complain at this juncture about improper assignment of the burden of proof. According to PSNH, this is because the Commission issued a secretarial letter on May 15, 2002 placing the petitioners on notice that they would carry the burden of proof at hearing, whereupon the petitioners made no objection to

this determination prior to submitting their rehearing motion. In these circumstances, according to PSNH, the petitioners have waived any right to object.

Addressing the petitioners' expressed due process concern, PSNH avers that the petitioners "were supplied with massive amounts of data and information regarding all manner of PSNH's investigation and handling of their voltage complaints, and the maintenance and operation of PSNH's system as it related to the service supplied to them." Objection of PSNH to Motion for Reconsideration (PSNH Objection) at 3. Further, according to PSNH, in confining the scope of the proceeding and the discovery conducted within the proceeding to the question of whether PSNH was providing safe and adequate service, the Commission was acting well within its lawful discretion. PSNH's last point with respect to due process is that the petitioners did not contend at hearing that they received an inadequate opportunity to conduct discovery and, having failed to lodge such an objection, cannot now claim a violation of their right to due process of law based on discovery problems.

In the view of PSNH, the Commission properly allocated the burden of proof to the petitioners, given that certain facts relating to the condition of the petitioners' inside wiring were exclusively within their control. According to PSNH, "[t]his was entirely reasonable given the undisputed record evidence that

Mrs. Guillemette refused PSNH access to her home to check her wiring or verify the statements of her electricians." PSNH Objection at 4. PSNH further avers that the failure of the electrician hired by the Commission to render a report did not constitute a reason to reallocate the burden of proof.

On the subject of voltage swings, PSNH contends that the rehearing motion improperly characterizes the evidence adduced at hearing and is simply an effort to reargue the case. Thus, according to PSNH, there is no basis to revisit the determinations in Order No. 24,070 on the subject.

Finally, PSNH disagrees with the petitioners' contention that they have been unlawfully held to an impossibly high standard of proof. In PSNH's view, the reference in Order No. 24,070 to petitioners' failure to "exclude the possibility" of problems on the customer side of the meter simply reflects the Commission's view that the petitioners failed to establish by a preponderance of the evidence that PSNH violated applicable rules governing voltage variations.

II. COMMISSION ANALYSIS

A. RSA 541:3 Standard

RSA 541:3 provides that we may grant rehearing of a previously entered order when "good reason for rehearing is stated in the motion." We discern no good reason in the petitioner's filing and therefore deny the rehearing request.

B. Construing the Asserted Grounds for Rehearing

The petitioners' motion is difficult to assess against the RSA 541:3 standard. The motion does not clearly and unequivocally state grounds for rehearing but, rather, consists of a series of 16 numbered paragraphs making a variety of interdependent factual and legal assertions about the case. For example, paragraphs 2 and 14 discuss the burden of proof assigned in the case, while paragraphs 3, 4 and 5 describe alleged deficiencies in pre-hearing procedure. Such a mode of presentation leaves unclear whether these expressed procedural concerns comprise separate bases for rehearing or are merely intended to buttress the petitioners' contention that the burden of proof was inappropriately assigned. Elsewhere, there are glancing and undeveloped references to due process, provisions of the Administrative Procedure Act and various Commission rules. We note that such ambiguous and unfocussed references in a rehearing motion are insufficient to preserve these issues for appeal. *Appeal of Coffey*, 144 N.H. 531, 534 (1999).

Generally, only issues raised in a motion for rehearing will be cognizable on appeal. *Appeal of Richards*, 134 N.H. 148, 154 (1991). Thereafter, an appellant would have the burden of persuading the New Hampshire Supreme Court that our order is contrary to law, unjust or unreasonable. *Appeal of Public Service Co. of N.H.*, 141 N.H. 13, 16 (1996). When a rehearing

motion is unclear, there is a real risk that we will deem an otherwise cognizable issue as not raised and that, on appeal, the movant will be unable to meet the burden of persuading the Court that our view of the issues on rehearing was incorrect. The analysis we undertake below represents our best effort at mitigating that risk by addressing all issues that could reasonably be deemed to have been raised in the motion.

Notwithstanding references to discovery, due process, the absence of an investigator's report, and the overall fairness of the proceedings, we can reasonably discern only three distinct grounds for rehearing asserted in the petitioners' motion: (1) that we unfairly assigned the burden of proof to them in Order No. 24,070, (2) that Order No. 24,070 failed to address evidence that PSNH violated rule Puc 1203.09, and (3) that Order No. 24,070 erred in determining that "wild voltage swings" experienced by the petitioners were not in violation of Commission rules and PSNH's tariff. It is these three questions that we will address, deeming all others to have been too ambiguously raised to have been presented.

C. Burden and Quantum of Proof

The petitioners complain that we should not have assigned the burden of proof to them, and also that it was improper for us to impose an unreasonable quantum of proof on them by requiring them to "exclude the possibility" of problems

on the customers' side of the meter. See Order No. 24,070, slip op. at 11. These arguments do not comprise good reason for rehearing.

As we noted in Order No. 24,070, this case has proceeded under a statutory track that is distinct from a typical Commission rate proceeding. The instant case is a complaint investigation, and the hearing and Commission decision themselves followed an extensive inquiry at the Staff level, during which the Staff of the Commission actively assisted the petitioners in developing information useful to determining the facts of the dispute. The Commission has considerable discretion in how to handle complaint investigations. RSA 365:4. In this case, as in complaint cases generally, the petitioner submitted a filing requesting some action by the Commission, supported the request with oral and written materials, and the Staff investigated. In such a case, once the Staff determines that the complaint lacks merit, the complaining party may, in effect, appeal this decision to the full Commission, and seek to advance its position at hearing.

In this case, sections 2, 3 and 4 of RSA 365 required PSNH to respond to the petitioners' allegations and, thereafter, for the Commission to conduct its own investigations. These steps duly occurred and Staff concluded PSNH had not violated the applicable service standards. The instant docket was then opened

as a contested case under the Administrative Procedure Act to provide the petitioners with a full and fair opportunity to rebut the evidence adduced by PSNH and Staff that PSNH had not violated any applicable Commission requirement under New Hampshire utility law.

We are aware of nothing in the Administrative Procedure Act that precluded us from taking this approach to the hearing we conducted on July 10, 2002. See RSA 541-A:31 (setting forth requirements for adjudicative proceedings in connection with contested matters). In the circumstances we believe it was a fair and reasonable manner in which to proceed.

It is in this context that our observations in Order No. 24,070 about problems on the customers' side of the meter are best understood. As we stated in Order No. 24,070, we explicitly found that PNSH had not violated its obligation to provide safe and adequate service. Our decision was based on the weight of the evidence presented at the hearing, regardless of sponsorship.

Although we noted that the petitioners had failed to exclude the possibility that their appliance problems were caused by problems with their household electrical system, we did not require them to disprove the existence of such factual circumstances. Rather, it was the petitioners' task at hearing to rebut the assertion by PSNH, confirmed in Staff's investigation, and supported by substantial evidence under oath,

that any problems experienced by the petitioners were not traceable to PSNH. They could have done so by demonstrating that PSNH violated the applicable service standards, as by producing an electrical engineer who could so testify, or by production of PSNH documents, or through cross-examination. They did not do so.

In addition, the record shows that appliance damage such as that cited by the petitioners can be caused by a number of factors. Indeed, the evidence at the hearing suggests that appliance problems such as those described by the petitioners are more likely to be the result of wiring problems on the customers' side of the meter than of voltage variations caused by the actions of the delivery utility. Therefore, an alternative approach could have been for petitioners to demonstrate that the problems they experienced could not have been caused by their equipment or usage. Such a demonstration might have prompted the Commission to require further evidence in support of PSNH's position. It is in this limited sense that Order No. 24,070 referred to questions about conditions on the petitioners' side of the meter.

In any event, preponderance weight of the evidence supported the Staff conclusion that PSNH did not violate service standards. The Commission saw no reason to go beyond this analysis, based on the record before us.

The petitioners' subsidiary points, about the course of discovery and the alleged failure of an electrician hired by the Commission to make a report of his findings, are to no avail. When the hearing was set would have been the appropriate juncture for them to argue that additional discovery was needed or that they had somehow been prejudiced by the lack of a report from the electrician. At no time prior to or at the hearing did the petitioners raise any issues relating to their access to evidence. In the circumstances any such objections to Order No. 24,070 have been waived. *See, e.g., State v. O'Connell*, 131 N.H. 92, 95 (1988) (concluding that due process claim waived when defendant failed to raise pre-trial discovery issue on timely basis). In any event, the petitioners have had full access to all material in the possession of the Commission that might have been helpful to them in meeting their burden of proof at hearing.

D. Rule Puc 1203.09

We next address the petitioners' contention that Order No. 24,070 is deficient for failing to take up their claim that PSNH violated rule Puc 1203.09. The rule requires utilities to conduct a "prompt and full investigation of customer complaints made either to the company or through the commission." Puc 1203.09(a). It further requires utilities to maintain records of all such complaints for a period of two years. *Id.* at (b).

The petitioners allege that PSNH violated Puc 1203.09 both by failing to conduct a full investigation and by failing to disclose to either the petitioners or the Commission Staff all of the material facts of which it had knowledge. According to the petitioners, the Commission should have deliberated this issue and made specific factual findings with respect to it.

Although the rehearing motion does not describe the particulars of these allegations, they are addressed at some length in the petitioners' post-hearing brief. In that document, the petitioners referred to two "misleading representations" made by PSNH to the Commission Staff in 1997: (1) not calling to the attention of the Staff that a loose conductor had been discovered on December 31, 1996, but stating instead that no problems had been found, and (2) stating that the damaged appliances for which petitioners were seeking recovery were, in fact, suffering from water damage.

The record evidence of the 1997 telephone conference at which PSNH allegedly made misleading representations to the Commission staff consists of (1) the testimony of PSNH witness Carol A. Burke, and (2) references to the telephone conference in a written chronology of events prepared by PSNH and placed in the record here as pages 100-103 of Exhibit 1. The entry in the chronology is dated June 18, 1997 and reads as follows:

[PSNH employee] Lee Cummings received a call on June 16, 1997, from Wally Ramsden and Trish Robbins of the

New Hampshire Public Utilities Commission (PUC) regarding Mrs. Guillemette's claim against PSNH for damaged appliances. PSNH denied the claim. The PUC was particularly curious as to why it took from December 1996 to June 1997 to rule on the claim. Lee Cummings spoke to Wally Ramsden and Trish Robbins. A review of the case revealed:

Four voltage tests were done from September 1996 through March 1997 - no problems were found.

All electrical connections on the "line" side were replaced on December 31, 1996 - no problems were found.

The customer refused PSNH access to her home to perform other tests.

The customer refused to provide documentation regarding the failed appliances from 1993 through 1996.

The customer refused to provide documentation of her private electrician's findings.

The appliances damaged were under water as a result of a flooded basement.

The customer did not submit the claim until February 19, 1997. The claim was investigated and sent to Steve Clark on March 21, 1997 and the customer was informed in April 1997.

The PUC agrees with PSNH's denial of the claim and will contact the customer.

Exh. 1 at 101.

Ms. Burke testified at hearing that she did not write the chronology, including the account quoted above, although she agreed with it and thought it was "probably accurate." Tr. 118. She declined to speculate on whether the PSNH employee who spoke

with the Commission Staff members knew but failed to disclose that a PSNH lineman had discovered a partially installed phase on the petitioners' meter in December of 1996. *Id.* at 119. Ms. Burke stated that, notwithstanding the referenced refusal to provide documentation of failed appliances from 1993 to 1996, Mrs. Guillemette had, in fact, submitted such a statement. *Id.* at 121. The PSNH witness testified that, consistent with the notation in the chronology, it remains "possible" that the petitioners are seeking compensation from PSNH in connection with appliances that were actually suffering from water, as opposed to electrical, damage. *Id.* at 122-23.

We did not base our decision in Order No. 24,070 on this evidence. Neither the report of the telephone conference appearing on page 101 of Exhibit 1 nor Ms. Burke's testimony about the report are probative of the factual issues we view as outcome-determinative.

As PSNH pointed out on cross-examination, the referenced chronology contains an entry for December 31, 1996 clearly indicating that a meter socket connection was replaced on that date. See Tr. at 145 and Exh. 1 at 100. Thus, from the standpoint of the petitioners, the most that can be said of the referenced page from Exhibit 1 is that PSNH failed to make a full disclosure of the relevant facts during the June 16, 1997 telephone conference with two Commission employees, as distinct

from an overall failure to investigate thoroughly and report fully.

Further, any speculation by PSNH that Mrs. Guillemette's appliances were damaged by water formed no part of the basis for our ultimate determination in this case that PSNH committed no sanctionable violations. Order No. 24,070 was silent on whether petitioners' appliances suffered water damage and we decline to make any findings on that issue now.

In summary, we did not in Order No. 24,070, and do not now find it necessary to evaluate whether, taken in isolation, a written account by PSNH of one PSNH communication during an early phase of the investigation of the Guillemette complaint constitutes a violation of our rules requiring a thorough investigation and a full report. Before and after that communication, there have been exhaustive interactions between Staff and both parties. PSNH placed voltage meters on the premises more than once, and its records show numerous inquiries and communications with the Complainant. PSNH witnesses came to the Commission as required to present the results and documentation of their investigation, and in effect to report further under oath at the hearing on this matter. The petitioner has shown no grounds for us to reconsider or rehear our decision.

E. Voltage Variations

The final argument advanced by the petitioners on rehearing concerns their allegation that PSNH violated rule Puc 304.02 (limiting voltage variations) and the Company's delivery service tariff by causing "wild voltage swings from zero to 148 over a five-minute period." Petitioners' Motion for Reconsideration at 3. The petitioners' position on rehearing is essentially identical to that expressed prior to the entry of Order No. 24,070. Accordingly, we need not revisit our previous determination that the record fails to establish that PSNH violated applicable requirements governing voltage variation.

III. CONCLUSION

RSA 365:4 provides the Commission with the discretion to investigate utility customers' complaints "in such manner and by means as it shall deem proper." That statute also authorizes the Commission to take action on such complaints "within its powers as the facts justify." Nothing in the petitioners' Motion for Rehearing persuades us that we erred either in our investigation or the resolution of the complaint reached in Order No. 24,070. Accordingly, the Motion is hereby denied.

Based upon the foregoing, it is hereby

ORDERED, that the motion of petitioners Ann and Tim Guillemette for rehearing of Order No. 24,070 is DENIED.

By order of the Public Utilities Commission of New
Hampshire this sixth day of February, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director and Secretary